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MARTIAL LAW.

BY

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MARTIAL LAW.

NO. I.

Not that martial law ordained by Congress for the government of the army and navy, but that usurped power over private citizens, assumed by military men in derogation of civil authority. It is to this mode of martial law, and the extraordinary doctrines concerning it, recently avowed by eminent men, that I propose to invite the public attention. Those doctrines as avowed by Mr. Adams, General Jackson, Mr. Buchanan, Mr. Berrien, and other Senators; also, by a minority of a committee of the House of Representatives, and practically acted on by the Rhode Island Legislature, it is my purpose to arraign at the great bar of public opinion, for national censure and condemnation.

It must be matter of surprise to all whose regard for civil liberty is not merged in the ephemeral and comparatively unimportant party strifes of the day, that it should be left to an anonymous writer in a newspaper to make the effort to awaken public attention to the importance of those doctrines, and to fasten public censure upon them. If perpetual vigilance be indeed the price of freedom, the modern appreciation of its value must be slight, when its sentinels are all asleep, none found to give the alarm when such doctrines are preached in the capitol and attempted to be enforced by a State Legislature. The debate in the Senate, which elicited the avowal of some of the most obnoxious of them, called forth the expression of abundant sympathy on the one side for the reputation of General Jackson, and on the other for the reputation of Judge Hall; whilst but little interest was manifested from any quarter about a vital principle of Government, involved in the discussion, of immeasurably more importance than the reputations or even the lives of a thousand General Jacksons and Judge Halls—that is, as to the right to proclaim martial law in this country.

There has been no instance of martial law in England for the last hundred and fifty years, and none in this country since the Declaration of Independence, but that given by General Jackson at New Orleans. Washington carried the country successfully through the seven years' war of the Revolution, amidst spies and traitors, without finding a necessity, or feeling himself authorized, to resort to such means. Baltimore, an open, unfortified city, and every way very similarly circum-

stanced to New Orleans, was successfully defended during the last war by the spontaneous efforts of its citizens, who voluntarily rendered more service in the way of personal exertion, than could have been extorted by any amount of coercion. This, too, amidst daily denunciations from the Federal press against the President for corruption, in getting the country into the war, and for imbecility in carrying it on; denunciations that never ceased until the press itself stopped—that is, when the editors and their workmen, with the alacrity of all other citizens, shouldered their muskets to meet the enemy in the field. Indeed the whole idea of extracting, by coercion from freemen, the most effective resistance against foreign invasion is based upon a wrong conception of the genius of a republic. All history proves that the patriotism and public spirit of a republic are more effective in calling forth in the hour of need the utmost energies of a State, than all the coercive powers of the most absolute despotism.

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The first in order of time, as also in magnitude of error, in promulgating the new doctrine concerning martial law, was Mr. Adams. In a speech, delivered at the late session of Congress, he said:

"When your country is actually in war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on according to the laws of war; and, by the laws of war, an invaded country has all its laws and municipal regulations swept by the board, and martial law takes the place of them.

"This power in Congress has, perhaps, never been called into exercise under the present Constitution. But when the laws of war are in force, what, I ask, is one of those laws? It is this: that when a country is invaded, and two hostile armies are met in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory.

"And here, I recur again to the example of General Jackson. What are you now about in Congress? You are about passing a law to refund to General Jackson the amount of a certain fine imposed upon him by a judge under the laws of Louisiana. You are going to refund him the money with interest, and this you are going to do because the imposition of the fine was unjust. And why was it unjust? Because General Jackson was acting under the laws of war, and because the moment you place a military commander in a district that is the theatre of war, the laws of war apply to that district.

"I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions, under a state of actual invasion and actual war, whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do in all such cases take precedence. I lay this down as the law of nations. I say the military authority takes for the time the place of all municipal institutions and of slavery among the rest, and that under that state of things, so far from its being true, that the States where slavery exists have the exclusive management of the subject, not only the President of the United

States, but the commander of the army, has power to order the universal emancipation of the slaves. I have given here more in detail a principle which I have asserted on this floor before now, and of which I have no more doubt than that you, sir, occupy that chair."

Next in order of time in the preaching of this modern heresy, were opinions expressed in the Senate by various Senators, pending the question of the restitution of General Jackson's fine. My limits will not permit special notice of any but those of Mr. Buchanan and Mr. Berrien. They are selected as having participated most largely in the discussion; as having taken opposite sides on the question pending; as being of opposite party politics; as being those who, from their intelligence, we had most right to expect better things, and as those who are probably best able to vindicate their errors. Mr. Buchanan said:

"In my opinion the General was completely justified in retaining Louallier, and in sending Judge Hall out of the city, to prevent him from issuing other writs of *habeas corpus*.

"The Senator says Judge Hall was bound to administer the law, and on an appeal to him he was bound to issue his writ of *habeas corpus*. Now here the Senator and himself were at issue; for he denied the premises even on the Senator's own showing. If General Jackson did no more than his duty in declaring martial law, the moment the declaration was made, *the official functions of Judge Hall ceased*, with regard to his power of issuing writs of *habeas corpus*, which might interfere with the defence of the city. *As soon as martial law was in force, every citizen of New Orleans, whether sustaining an official character or not, was bound to submit to it;* and during its continuance Judge Hall was no more than any other citizen, and could have no more right to violate it than any other citizen. For it was quite a plain case, that if martial law did not supersede and put in abeyance the civil power, it would be wholly inefficient in attaining the only objects for which alone it could be tolerated or justified." He also contended that it was exclusively in the discretion of General Jackson, and not with the civil authorities, to say when martial law should cease.

Mr. Berrien said: "General Jackson was perfectly excusable, under all the circumstances of the case, in declaring martial law, and that he was equally excusable in disobeying the writ of *habeas corpus*. Under similar circumstances, he himself would have done exactly what General Jackson did, with respect to declaring martial law and refusing to obey the writ of *habeas corpus;* but to avoid collision with the civil power, he would have sent the prisoner out of reach of civil authority, and he certainly never would have arrested Judge Hall for what he did."

Shortly after the utterance of these and similar opinions, and no doubt influenced by them, the Legislature of Rhode Island was guilty of the egregious folly of passing an act attempting to authorize the Governor to proclaim martial law over that State, who also was silly enough to proclaim it, for the purpose of suppressing a contemptible rebellion.

I have not language to express the surprise, not to say horror, with which I have witnessed the promulgation of these opinions. Thereto-

fore, I had supposed that, in the estimation of all intelligent men in this country, martial law stood upon the precise same footing and none other, as lynch law, regulators' law, or mob law. For in a legal or moral sense, they all have the precise same basis. They are equally the same arbitrary usurpation of power, without a particle of law or right to sustain either. Neither can, or at least ought, ever to receive the direct or indirect sanction of the law or any department of the Government; though considerations of policy may cause them occasionally to be overlooked.

The doctrine is now, for the first time in this country, promulged by eminent men in civil stations, that martial law is some other and different as to right from mob law; that it is not a mere unlawful violence which it is the right and duty of every citizen to resist; but is a law paramount to the Constitution itself, which, when proclaimed, every citizen and every civil functionary is bound to submit to and obey, a law which "sweeps the Constitution and all other civil law by the board," and leaves the property, liberty, and life of every citizen, at the will of a military despot.

Extraordinary as this doctrine is, fit as it only is to be met and for ever buried under a universal national execration, Mr. Adams warns us against meeting it with mere denunciation. He boastfully challenges its refutation by sober argument, and says he is ready to support it by a thousand instances from the laws of nations. Hard as the task may be, it shall be my endeavor so far to cool the blood, as to give him and Mr. Buchanan an answer in the way of sober argument first; but with no promise to abstain from fitting denunciation afterwards.

Let no man turn from my effort in this behalf, because this doctrine is sheer madness, and needs no answer. The public ravings of such men as these should never be slighted; they should always be met and answered. We even now find Mr. Adams quoting the conduct and opinions of General Jackson as authority on constitutional law, when they happen to suit him, though he was wont to say, they were only fit to be quoted on military subjects or on the qualities of a race-horse. In after times, other Generals and Senators will quote these opinions of Messrs. Adams, Buchanan, Berrien, and the conduct of the Rhode Island Legislature.

As to Mr. Adams' other authority, the laws of nations, it is difficult to understand what bearing they can have upon a question of lawful power within this Union. They may define the rights of the conqueror and the duties of the conquered; but that is not what Mr. Adams means. He contemplates an unsuccessful or undetermined invasion merely, and says that "an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them," with an incidental power to both our own and the foreign commander to emancipate the slaves. Eminent as Mr. Adams is as an authority on the law of nations, yet his opinion must surely yield to that of the whole American people as expressed in their Declaration of Independence. This very mode of annoyance towards an enemy, by inciting a servile insurrection, is there denounced as contrary to the

law of nations and the usages of civilized warfare. It is ranked in atrocity with that other infamous practice of the English Government, the allying itself with the scalping-knife and tomahawk. According to the better opinion, then, any invading foreign commander, who should issue such a proclamation as the one indicated by Mr. Adams, would thereby cast himself and those under his command out of the pale of the protection of the usages of civilized warfare. Much rather, therefore, would any commander of ours be considered as absolving himself from the protection of all law, by such a course, and subjecting himself to be rightfully shot by any one who chose so to rid the country of so infamous an incendiary.

The American people have heretofore lived under the fond delusion that they had the exclusive privilege of making constitutions and laws for themselves, and that the combined will of all the nations of the earth could not rightfully add to or alter those laws in the smallest particular, so far as they operate within our own territory. Nor do the laws of nations themselves make any pretension to the power asserted by Mr. Adams in their behalf. There is no principle of international law better settled, probably none other about which there is less difference of opinion, than that the laws of one nation cannot operate within the territory of another; and, by consequence, neither can the combined laws of two, three, or twenty nations, so operate within the territory of another nation.

There is a class of politicians in this country who have long been suspected of having no great love or admiration of our republican institutions, viewing them as a useless experiment which must ultimately give away to monarchical government, and therefore as rather impatient for the advent of some bold great man sufficiently powerful to do away with the idle trumpery of a constitution, and relieve us from the trouble of governing ourselves. I must confess it has been heretofore supposed that Mr. Adams did not belong to this school of politicians. But it seems he goes a great way beyond them. They were merely suspected of sighing for a domestic usurper. He is for subjecting our Constitution and laws to the mercy of a foreign invader also. He not merely concurs with Messrs. Buchanan, Berrien, and Jackson, in the right of a military man to usurp authority over the Constitution, when he thinks it necessary, and to keep it up as long as he thinks it necessary; but for fear an American commander would never have the temerity or niquity to attempt what he has in view, he claims that the power rightfully belongs to a foreign invader also, having in his eye, no doubt, an invader in particular that never scrupled about means however infamous, in the attainment of ends however iniquitous.

If a foreign invader can strike dead in the hands of its owners four hundred millions' worth of property by his mere proclamation, though he be defeated and driven from our territory the next day, it is by a most precarious tenure indeed that we hold all which government was instituted to protect and guard. For Mr. Adams does by no means limit this power to a mere emancipation of slaves, but says it sweeps

the whole Constitution by the board, and substitutes the invader's will in its place. He no doubt looks to that admired British Government for the invading commander who is by proclamation to emancipate the three millions of his black fellow-citizens. But he should remember that, though it be now the pleasure of that immaculate Government to preach a crusade against negro slavery, she was formerly the patron and even attempted to be the monopolizer of the slave trade; that she even forced the slaves upon this country in despite the remonstrance of our fathers, as she is now attempting to force her opium upon the Chinese; that she may again change her views, drop her crusade against negro slavery, and preach a new crusade, as formerly, against the Protestant religion or any other cherished right of New England. Does that also lie at the mercy of her proclamations? Can she thus put down that religion, and put up the Catholic or any other in its place?

But, says Mr. Adams, this is not a mere theory; "his doctrine has been carried into practical execution." He cites us to the example of those eminent man-slayers and expositors of the law of nations, and of the usages of civilized warfare, Generals Morillo and Bolivar. He says they both did the thing in Columbia, though he does not explain how; after one had emancipated all the slaves, it was still left for the other to do. Neither has he done his argument all the justice he might, in favor of the might of military power, from the example of the best of those two eminent expositors. He forgot to tell us that Bolivar, after having emancipated the blacks, by virtue of the same martial law, enslaved the whites, and placed a crown on his own head. We of the South even, who are so much interested in the subject of slave property, would deem this a much more striking and convincing example of the extent of military power than that of the mere emancipation of slaves.

How differently from his forefathers of Massachusetts does Mr. Adams consider the influence of foreign laws, and the overshadowing supremacy of military power! They say in their Constitution: "The people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent." He says they are controllable by the arbitrary will of a military chief, foreign or domestic; and that even their constitution is in subordination to the law of war and the law of nations. Their Provincial Congress, writing to the Continental Congress, in May, 1775, on the necessity of their "taking up civil government," said: "As the sword in all free States should be subservient to the civil powers, and as it is the duty of the magistrate to support it for the people's necessary defence, *we tremble at having an army, although consisting of our own countrymen, established here, without a civil power to provide for and control them.*" This being in time of actual war, a war of revolution, too, what a silly set of old-fashioned fellows that Provincial Congress must have been to be thus sighing for a civil government to control the army, they not knowing in their simplicity that it was the undoubted prerogative, by the law of nations, for the military to control the civil

power in time of war! Fighting as they were for their lives and liberties, in the midst of an actual war of revolution, they trembled at the idea of an army of even their own countrymen, because there was no adequate civil power to control it. So little of this fear of military sway is there in Mr. Adams, that he contends the military rightfully does and should overmaster and control the civil authority, in time of war from invasion or insurrection.

In case of a slave insurrection, if the United States are called upon to fulfil the constitutional guarantee against domestic violence, Mr. Adams says the President, or one of his subalterns, may, at his discretion, in order to put an end to the insurrection, emancipate all the slaves. That is, when the slaves are committing violence to obtain their freedom, the President, in discharge of his duty, to aid in putting down that violence, may, by proclamation, emancipate the slaves. The slaveholders call in the Government to aid in keeping the slaves in bondage, and he may perform this duty by setting them free. Mr. Adams does not at all confine this sovereign power in the President or his subalterns to the mere particular of emancipating the three millions of his black fellow-citizens, but allows the full force of the analogy, that necessarily extends it to all other subjects of property, right, or constitutional guarantee. For instance, when Government interposed with its military power to suppress Shays' rebellion in Massachusetts, or the whisky insurrection in Pennsylvania, or the recent suffrage insurrection in Rhode Island, the officer commanding the military power would have had the right to suppress the two first, by annulling the taxes which produced them, and the last, by granting free suffrage to everybody.

Unable to find anything in the Constitution to authorize the Federal Government to interfere with the question of negro slavery, he is driven to a power *dehors* the Constitution, and conjures up this undefined and undefinable power of martial law. He at once sees that it will not do to treat the war power as subordinate to and flowing from the civil functionaries of the Government, for it must necessarily be only commensurate with the powers of those functionaries. He, therefore, resorts to the desperate shift of claiming it to be a power paramount to the whole Constitution. He boldly denies to the nation the right to declare, as it has done, that the Constitution shall be the supreme law of the land; and asserts that martial law is paramount to all other law, not controllable by the will of the nation or any form of constitution. A grosser absurdity surely never entered the mind of an intelligent man, educated under a government having a written constitution.

Though I cannot admit that Mr. Adams is borne out, by these novel doctrines, by the law of nations, yet I must in candor concede that he is fully sustained by his other authority, General Jackson. Mr. Adams' theoretical doctrine requires no enlargement of the principles and powers under which the General acted and brought into practical use, in carrying out his martial law at New Orleans. If the fitness and necessity of the occasion for declaring martial law, and keeping it up, rest in the mere discretion of one of the President's subalterns, as, ac-

cording to Messrs. Buchanan and Berrien, it does, if he can enforce it over the greater part of an entire State, why may not the President proclaim and enforce it over all the slaveholding States? If, by color of it, the subaltern can, as General Jackson did, drive, at the point of the bayonet, the representatives of the people of a sovereign State from their legislative halls, close the courts of justice, banish hundreds of meritorious and unoffending citizens, violate every constitutional guarantee in behalf of the freedom of the citizen, abolish the freedom of the press, prosecute one for his life on a charge of treason for a mere exercise of its immunities, and seek to punish with death a private citizen, by a prosecution for libel before a court martial, why may not the President, when called upon to suppress a servile war, vest himself with dictatorial authority over all the slaveholding States, by declaring martial law, and then, by his mere proclamation, liberate all the slaves? If the power rightfully exists in a military commander to do the one, surely much rather can he do the other also. We, of the South, do most cheerfully concede that if he can take from us our civil liberties he can take from us also our slaves. Mr. Adams, on the contrary, is so engrossed with his animosity to negro slavery, as to forget himself, and advocate slavish principles of government. He suffers himself to be carried so far by zeal for his black fellow-citizens, as to advocate principles that would inevitably lead to the enslaving of his white fellow-citizens.

There is an American authority in favor of Mr. Adams, which he will do well to quote when he comes to furnish us with his thousand instances from the law of nations, for it is one he seems to hold in high respect on this subject. It is the declaration of General Jackson, in his letter to Mr. Munroe, that if he had been the commander of the military district in which the Hartford Convention sat, he would have hung its leaders under the second section of the rules and articles of war. Mr. Adams can add, in corroboration of this authority, that, while the nation was making mirth out of this declaration, as a something only fit to be laughed at, in which the General had said a great deal more than he seriously intended, the General himself was wont to asseverate that he was in sober earnest, and that there was a great deal more in that second section than people thought. It will not be amiss, as his opinions are becoming such high authority, to recite that section, so that people may know all that is in it: "In time of war, all persons not citizens of, or owing allegiance to, the United States, who shall be found lurking as spies in and about the fortifications and encampments of the armies of the United States, or any of them, shall suffer death according to the laws and usages of nations, by sentence of general court martial." This was no new idea with the General, for it had full possession of him when he was trying to have Mr. Louallier hung as a spy, for publicly calling in question the General's power to establish martial law. As the General's construction of this famous section is not allowable by any of the canons of construction known to common sense or ordinary law, it of course must rest upon those that are recog-

nized by Mr. Adams' laws of war, and he is, therefore, entitled to all the corroboration that the weight of the General's opinion can add to his own.

What an admirable substitute is this newly discovered power, for all those powers our fathers were silly enough to attempt to deny to the Federal Government, by express constitutional prohibition; such, for instance, as the power to pass bills of attainder and *ex post facto* laws; to abridge the freedom of speech or the press; to hold men answerable for capital or infamous crimes, without an indictment; to deprive men of life, liberty, or property, without due process of law; and in criminal prosecutions to deprive them of the benefit of an impartial jury of the vicinage! It is an old and familiar tyrant's trick, to pinch the subject till he squeak, and then punish him for squalling. No government ever lacked the wit to create a rebellion when one was wanted. When once produced, where the need for bills of attainder or *ex post facto* laws, when the laws of war at once cast the lives and fortunes of the whole community into the hollow of the President's hand, or into that of any military minion he may send forth to deal out his own or party vengeance? If nullification had not stopped short of actual rebellion, with Messrs. Adams and Buchanan to expound the law, and General Jackson to execute it, how summary might have been the expurgation process to the hot spirits of that day! With or without the intervention of a drumhead court martial, how effectual and satisfactory might have been the punishment of all those suspected of nullification, whether found in arms or not!

Forty years ago the political fortunes of the house of Braintree were wrecked in an effort to introduce *necessity* as a substantive power of Congress, within the Constitution. May equal success attend the present effort of a younger scion of that house, to plant necessity in this country as a controlling power in the President and his military subalterns above the Constitution. Oh! necessity, State necessity, that instrument of evil, would that its parent had, or that some kindlier influence could, forever "damn it black," so that all the world might know it for what it is, when used as a pretext for the usurpation or abuse of power! Know you not what it is, this thing called State necessity? To go no farther back in history, you may learn what it is in the proscriptions of the French revolution, in the conscriptions of the French empire and its wars for universal conquest; in England's attack on Copenhagen, in her piratical seizure of the Spanish galleons, and in her impressment of thousands of native Americans into her floating hells; in our own alien and sedition laws, in all other usurpations and abuses of power by political parties, and finally, you may learn what it is in the trial for his life of a respectable private citizen, before a court martial, on the charges of being a spy and the publishing a libel.

NO. II.

What is it, this martial law? It is simply the mere will and pleasure of the military man by whom it is proclaimed and enforced. The other rightful martial law is well defined by the Legislature in the rules and articles of war. This is defined nowhere, nor sanctioned anywhere, or in any way; but, being the mere creature of him who proclaims it, is, of course, just what he chooses to make it. It is the mere unbridled will of a military despot.

Hale and Blackstone tell us, "that it is built on no settled principles, but is entirely arbitrary in its decisions, and is, in truth, no law, but something indulged rather than allowed as law, a temporary excrescence bred out of the distemper of the State."

Notwithstanding a clause in *magna charta* prohibiting the use of this law in time of peace, the Kings of England habitually employed it for various purposes of tyranny, until it was finally abolished, in time of peace, by the act termed the Petition of Right, in the early part of the reign of Charles the First. But Hale and Blackstone seem to think it might still be employed in time of war. When, however, this intimation of theirs was cited, in 1792, before Lord Loughborough, he said that "martial law, such as is described by Hale and Blackstone, does not exist in England at all, but, for a century, has been totally exploded, as contrary to the Constitution." "It is totally inaccurate to state martial law as having any place whatever within the realm of Britain." Shall it be with a blush of shame or a feeling of indignation that we find an English court and English lord better understanding and better appreciating the principles of civil liberty than do some of our American Senators?

Some of the uses to which martial law was formerly applied in England, as detailed by the historian Hume, will serve not merely as authority to General Jackson for his mode of applying it here, but may strengthen predilections for the lodgment of arbitrary power in single hands from the trustworthiness they evidence of all such depositories. So late as the reign of Philip and Mary, a proclamation declared that whoever was possessed of heretical books (that is, Protestant books), and did not presently burn them, without reading them or showing them to others, should be deemed a rebel, and executed immediately by martial law. This authority scarcely bears General Jackson out; for he never issued any proclamation notifying his subjects at Orleans that whoever questioned his authority should be deemed a spy and immediately executed. But the uses to which it was applied in the reign of Elizabeth do fully bear him out; "for, in cases of insurrection, it was not only exercised on military men, but on the people in general, and was extended to those who brought papal bulls, &c., from Rome: any person might be punished as a rebel or as an aider and abettor of rebellion whom the provost martial or lieutenant of a county pleased to suspect." This is a full authority for hanging, not merely Mr. Louallier, but the leaders in the Hartford Convention also. In the same

reign there issued a commission to the provost martial "to take all idle vagabonds, and riotous persons, and speedily execute them according to the justice of martial law." The historian also tells us how Sir Francis Bacon succeeded by his wit in rescuing, from the fangs of that bloody vixen Elizabeth, a literary man whom she wanted to proceed against capitally by martial law, because he had dedicated a book to the Earl of Essex whilst the Earl labored under her displeasure.

The mode of martial law, enforced at Orleans by General Jackson, and which is vindicated by Mr. Adams and Mr. Buchanan as rightful, and by Mr. Berrien as excusable, requires the exercise of two of the highest attributes of sovereign power, far above the powers of ordinary legislation: the power to revoke or suspend existing constitutional law, and the power to substitute other law in its stead.

Can such a power be rightfully exercised in this country? In other words, can there rightfully be in this country a usurpation, and consequent tyranny, for any purpose or under any pretext? Every usurpation is also a tyranny. The Greeks, who first taught the world a proper detestation of usurpation and tyranny, had but one word in their language to signify both. So, also, tyrant and usurper must forever remain as synonymous in the estimation, if not in the language, of every republican. An utter detestation of both is the great moral basis of every government, aspiring to the dignity and character of a government of law.

Our institutions are framed upon the broad principle, that no rightful authority can exist in any department or functionary of government, but by the assent of the governed. Other governments derive their powers from usage and implied assent. Not so with us. Ours are all derived from written constitutions and express assent. The necessary inference being, that any power not granted does not belong to, but is withheld from, Government. The master workmen who framed the Constitution of the United States, relying upon the efficacy of this inference, adopted no bill of rights, because they thought it useless and perhaps pernicious, as a mere omission might be construed into a permission, and because it would mar the compact and perfect symmetry of their work. The nation, however, not having quite so much concern for mere symmetry, and not quite so much faith in mere rules of construction, amended the Constitution after adoption, so as to give it a bill of rights; but, to close the door against omission being construed into permission, took care expressly to declare, that all powers, not delegated, were reserved to the States or to the people. The intention was to grant all powers, deemed necessary for good government in any emergency, but, if inadequate, still none other was to be exercised; for, upon a full survey of the whole subject, the nation greatly preferred all the evils that might ensue from the want of power, to incurring the hazard of the abuse of such powers as were withheld. The great care, the great solicitude, was the preservation of civil liberty, and the perpetuation of a republican form of government. To those, all other considerations were made subsidiary and subordinate. There were not

wanting then, as now, croakers and false prophets, who told them that the Government was too weak, that they were unnecessarily jealous and cautious in withholding essential powers. The answer was, it is strong enough for liberty, and that we mean to have for ourselves, and to secure for our posterity, at every hazard.

The powers of a general are derived from his commission, which emanates from, and which he holds at, the will of his commander-in-chief, the President. All that he rightfully does, proceeds in fact, or it is supposed to proceed, from the order of that chief. If the subordinate can declare martial law, so much rather can the chief. If the one can rightfully close the halls of an independent State Legislature, so can the other the halls of Congress. If the one can refuse to obey the writ of *habeas corpus* of a district court, so can the other refuse to obey the mandate of the Supreme Court. If the one can substitute his will for law, over the greater part of an entire State, so can the other over a whole Union. If the President has any such power, it is to be found in the Constitution. The powers confided to him are all expressly stated and enumerated. The auxiliary or necessarily implied powers, those necessary to carry into effect the express powers, are all confided to the discretion of Congress alone. He has no power, express or implied, to suspend law or make law. But why debate the existence of such power in any mere subordinate functionary, when it is so obvious that the unanimous vote of both houses of Congress can, in no emergency, rightfully establish martial law over any State in this Union? It is a gross mistake, as will be more precisely shown hereafter, to suppose that a mere suspension of the writ of *habeas corpus* necessarily superinduces or permits the establishment of martial law. Congress had as well attempt, by law, to condemn a citizen to be shot without trial, as to take the people of any one of the States from the protection of their own laws, and subject them to the arbitrary will of a military despot. The chief of the President's powers, under the Constitution, is to have the laws executed. He has no power to set aside or annul any law of Congress, much less a fundamental law of the Constitution, or to set aside the whole civil polity of a State and substitute a new code of his own. If the Constitution were now to be made anew, no man except a monarchist would vote to concede him such a discretionary power in any state of emergency whatever; still less would it be conceded to any chance military officer, who might be placed in circumstances supposed to require the exercise of such a discretion.

The power to suspend laws and the execution of laws was formerly one of the prerogatives of the crown in England, or at least it was habitually exercised as such, down to the revolution of 1688, when it was deemed so repugnant to every idea of liberty that the nation determined it should forever cease. In the preamble to the celebrated declaration of rights, justly denominated the greater charter of English liberty, the exercise of this power is assigned as the first cause for dethroning James II., and by the first article of the great covenant between King

and people then adopted, it is declared that no such power shall belong to the crown.

Our State constitutions, not being, like that of the Union, a special delegation of a few enumerated powers, but general delegations, with special reservations and exceptions, necessarily required very guarded bills of rights. But this power is so obviously a legislative one, that any person might well have thought there was no necessity for so declaring; yet such was the jealousy and odium against the exercise of the power by any other than the legislative department, that we find it most sedulously guarded against in those constitutions.

So, also, as to that other still greater and more obnoxious power of substituting martial in the place of civil law, we not only find the Declaration of Independence setting forth as one of the causes for renouncing allegiance to the King of England, "that he has affected to render the military independent of and superior to the civil power," but this very mode of substituting another in place of established law, is expressly and unqualifiedly prohibited by the State constitutions. It is needless to cite the authority of individual names, against the allowance of martial law in any case, when we have the authority of our fathers, speaking collectively and unanimously, by whole States, in its utter condemnation. It cannot be unprofitable or inappropriate in these degenerate days, whilst the first men in the nation are boldly advocating the doctrine of martial law, and nearly half the Senate shamelessly approving an outrageous instance of its exercise, to recur more minutely to what those men of the Revolution have thought and said on this subject. Listen, then, ye degenerate sons, to the warning voices and commands of your fathers, whilst I evoke the very embodiment of all their patriotic virtue and intelligence, and they speak to you by States, through their written constitutions:

Massachusetts.—The military power shall always be held in exact subordination to the civil authority, and be governed by it.

New Hampshire.—In all cases, and at all times, the military ought to be under strict subordination to and governed by the civil power.

New York.—No authority shall, on any pretence whatever, be exercised over the people of this State but such as shall be derived from and granted by them.

Delaware.—The military shall, in all cases and at all times, be in strict subordination to the civil power.

Pennsylvania.—The military shall, in all cases and at all times, be in strict subordination to the civil power.

Maryland.—In all cases, and at all times, the military ought to be under strict subordination to and control of the civil power. No person, except regular soldiers, mariners, and marines in the service of the State, or militia when in actual service, ought, in any case, to be subject to or punishable by martial law.

Virginia.—In all cases, the military should be under strict subordination to and governed by the civil power.

North Carolina.—The military should be kept under strict subordination to and governed by the civil power.

South Carolina.—The military shall be subordinate to the civil power.

Vermont.—The military should be kept under strict subordination to and governed by the civil power. No person can, in any case, be subject to martial law, or to any pains or penalties by virtue of that law, except those employed in the army, and the militia in actual service.

Kentucky.—The military shall, in all cases and at all times, be in strict subordination to the civil power.

Tennessee.—In all cases, the military shall be in strict subordination to the civil authority. No citizen, except such as are employed in the army, or militia in actual service, shall be subject to corporeal punishment under martial law.

Ohio.—The military shall be kept under strict subordination to the civil power.

The unambiguous import of the general tenor of the Federal Constitution is to the same effect.

Such is the warning voice and command of our fathers. Let us beware how we fail to heed and obey. Not content with saying that no man or body of men, other than the regularly constituted Legislature, shall have power to suspend law or make law, they furthermore especially declare, that military men shall have no such power, that the law martial in particular shall never be substituted for civil law. These inhibitions against military usurpation are all absolute and perfectly unqualified. No exceptions are made for time of war or supposable cases of great State necessity, such as might grow out of rebellion or invasion. Some of them not content with positive prohibition without exception have, with superabundant caution, gone so far as to say that, *at all times and in all cases*, the military shall be in strict subordination to the civil authority, or otherwise to speak, that, *at no time and in no case*, shall the military assume superiority. Fully cognizant of the tyrannous uses that had been made of that immemorial tyrants' plea, *necessity*, they intended to extirpate it utterly from our system, by declaring that, at no time and in no case, should it be allowed as an excuse for military usurpation. They intended carefully to preclude all idea that, in any possible case of presumable necessity, it would be allowable for the military to subvert the civil authority. They intended to repudiate and utterly reject that servile maxim of arbitrary Governments, *salus populi suprema lex*, also that other, *inter arma silent leges;* and substitute in their stead that republican maxim, alone suited to constitutional freedom, *fiat justitia, ruat cœlum.* The concurring import, of all this language, of all these men of the Revolution is, that, *at no time*, *for no purpose*, *under no pretext*, *shall military supremacy ever have foothold in this land.*

Those stern republicans, who loved freedom with a holy devotion for its own sake; who cherished it as the choicest good of human existence, as that inappreciable something without which life was not worth the having; who were fully imbued with that Cassius-like spirit, which would as lieve tolerate the eternal Devil as a usurper in Rome; they, who had

won their own freedom with their blood, and whose greatest care was to transmit it unpolluted to their remotest posterity; they, the mighty founders of this great Republic, with full knowledge of all the temporary ills and inconveniences that might ensue, determined, whatever might be the result, to leave military men not an hour, not an occasion, for the lodgment of that usurping, o'ermastering power which has been the destruction of all other Republics. They knew that to give it ever so slight a pretext for acting by its own authority, and upon its own mere discretion in subversion of civil authority, would be, from the mere encroaching principle of all power, *crescit eundo*, to allow it means by which, sooner or later, it would prostrate all those safe-guards which they were so sedulously rearing to secure to their posterity the enjoyment of that greatest earthly boon—a well-ordered civil liberty. As to the Constitution, the goodly fruit of all their toils and dangers, the matchless work of their unequaled wisdom, in which are garnered up the world's last hopes for civil liberty, in which freedom must forever live or know no life, as to its sanctity—its inviolability—its supremacy—they adopted as a maxim for uniform observance and unvarying application, *fiat justitia, ruat cœlum.*

Thus far, in our history, I am proud to say, the maxim has been inflexibly carried out by at least one department of the Government. Our courts, in numerous and unwavering decisions, have uniformly returned the same stern answer, to the officers of the army and navy, that no State necessity can, in the eye of the law, authorize or excuse a violation of individual private right, but that all reasons of excuse and all claims of indemnity must be addressed to the discretion of the other departments of the Government. Certain ancient *dicta* that countenanced the taking or destruction of private property, in cases of great State necessity, were rejected as unsuited to and inadmissible in our system of Government. The same answer has uniformly been returned to the Legislature, that no necessity will authorize a violation of the Constitution, by the unanimous vote of even that highest department of the Government.

For the sake of the military discipline of the soldiers of his country, a Roman consul caused his own victorious son to be beheaded for fighting against orders. The three hundred Spartans threw away their lives at Thermopylæ, upon the same principle. These and such like examples rendered the discipline of their soldiers perfect and their armies invincible. War was the great business of those Republics, and the military discipline of their armies the most important interest of the State. Ours, on the contrary, is a pacific Republic, needing and seeking no aggrandizement by foreign conquest, and shielded by happy geographical position from all danger of permanent foreign invasion. Our distinctive, most characteristic National feature is, that of having emphatically a Government of law. For that alone can we excite either the envy or admiration of other nations; for that alone can we justify the exulting pride or heart-devoted love with which we affect to regard our country. The great national interest with us, the great point of disci-

pline is, and must ever be, implicit and devoted obedience to the law. Preserve the sanctity and inviolability of the Constitution, and the great vessel of State will, without guidance, escape the "Scylla and Charybdis of anarchy and despotism." Destroy that sanctity, suffer it by repeated precedents to be set aside at the mere discretion of party majorities, military chiefs, lynch judges, or mobs, under the pretext of necessity, and no guidance can save us from one or the other of those perils. Let those who are sighing for the superior blessings of a stronger government, who are dreading the supposed too strong democratic tendency of our institutions, and who would cling even to martial law, as a conservative principle against that tendency, take a more considered view of the real character of this nation, and they will be satisfied the chance is at least equal that monarchical institutions will never be reared in this country but upon the wreck and ruins that a previous anarchy shall have left behind. Are they willing to pay that price? Why not rather, all beautiful and loveable as it is, endeavor to secure for the Constitution, by precept and example, that affection and obedience which are alone necessary to its perpetuity and the successful proof of its being the wisest and the best, as it is the freest government ever known to the world? Anarchy is not to be avoided by the destruction of the principle of constitutional sanctity. There can be no means more certain to destroy that sanctity, than the allowing a discretion in any single man to trample the Constitution under foot. That ingrained feeling of equality, which will remain as long as there is the semblance of freedom left in the land, teaches each of us to believe that he has as much right to violate the Constitution as any other man. How much rather will a hundred or a thousand assume the right to a similar discretion, even though you call them a mob, and with still greater propriety and aptitude will party majorities in the State Legislature and in Congress infer a discretionary right to violate the Constitution, for the sake of that greatest State necessity—party supremacy!

We are told of two cases of the violation of law and private right by Washington, at the siege of York, as the two greatest if not the only instances of the usurpation of power by him during the whole of the Revolutionary war. They will serve as examples to elucidate the subject, verging as they do to the very utmost limit of what an officer may do, and stand morally excused, without being excused by the law. One was the demolition of a house that stood in the way of his approaches to the works of the enemy; and the other, authorizing the seizure of some cattle, indispensable to the sustenance of his army. Both were, even strictly speaking, *necessary* violations of law and private right; but no otherwise so, except in a moral sense, than if the same things had been done by a private individual. Legally speaking, the acts derived no validity from the facts of their having been done by a military commander under circumstances of the most urgent State necessity. He no doubt would voluntarily have made good the damage out of his own pocket, if redress could have been had in no other way; but he could have been compelled to do so in a court of law. The circumstances

attending the acts would have aided his defence no otherwise than to prevent the jury from giving what is termed smart money. If he had sold the cattle or bartered them for other provisions, he would not have transferred the title, but the owner could still have recovered them from whomsoever he might have found in possession. If the owner had resisted and killed the officer making the seizure, it would have been justifiable homicide; if the officer had killed him, it would have been murder. So, also, if Mr. Louallier had killed General Jackson in defending himself against the illegal proceedings of the General, it would have been justifiable homicide; whereas, if he had been hung by sentence of the court martial, as they had no lawful jurisdiction over him, it would, in a legal as well as moral sense, have been murder, and a foul one too, not only in the General, but in every member of the court martial, for which nothing but their blood could have atoned. This law is well settled. Indeed the court martial so considered, in effect so decided, and refused to soil their hands with the work. They sustained a plea to their jurisdiction upon all the charges, except that of being a spy, and promptly acquitted him of that, both the charge and the proof being alike ridiculous. There is therefore no truth in the notion that the proclamation of a military commander can divest the owner of title to his slave; or, in the idea of Messrs. Adams and Buchanan, that the proclamation of martial law actually supersedes the civil law and divests civil functionaries of their powers. On the contrary, in no shape, in no way, for no purpose, does or can the law sanction these usurpations as legitimate; and most certainly not, when the usurpation is treasonable and the purpose a foul and wanton murder.

Little did I ever expect to live to hear the doctrines of passive obedience and non-resistance to a usurper preached in the halls of the American Congress; that the usurped authority of a military commander could rightfully take from me all my civil rights as a freeman, and deny me even the right of remonstrance, that poor prerogative of the wretched under the penalty of death; that it could revoke the power of my constitutional guardian, the judge, compel him, as a matter of duty, to become the aider and abettor of usurpation, and to perform the office of my hangman, if the usurper so wills.

According to my remembrance, the only attempt at martial law, during the Revolution, was in the State of Virginia. At a gloomy period of the war, when a British army was devastating that State, certain members of its Legislature, consulting their fears more than their allegiance to the principles of liberty, had the folly to introduce and seriously urge a proposition to make Patrick Henry temporary dictator. We all recollect how that proposition was met. The proposal and the proposers were instantly silenced by a single sentence calmly uttered by a true-hearted republican of the old stamp. That noble-minded Virginian, though a personal friend of Henry, as the only suitable answer to the proposal, contented himself with telling them: "The day you place your dictatorial crown upon the brow of Patrick Henry, or any other man, that same day I'll plant my dagger in his heart."

This brought them to a sober thinking, which soon satisfied all that no temporary advantage, to be gained by the accumulation of power in a single hand, however trustworthy, could compensate the evils of such an example in a republic.

What would the men of that day have said to a dictatorship, not created by the Legislature, but by one man's own usurpation? Twelve months ago, I should have been ashamed to think so meanly of any portion of my countrymen as to believe that General Jackson could have enacted the things he did at Orleans in any one of the older States, where there was an unmixed native population, and have escaped with his life. But, since then, the conduct of the Rhode Island Legislature, with the tame acquiescence of the people of that State, and the damnable heresies preached in the halls of Congress, with the attendant public apathy, have raised a horrible doubt whether a large portion of the nation is not already in training for the yoke of a master.

What would the men of the Revolution have said to these modern doctrines? What would they have thought of the vindication of everything General Jackson did, as justifiable by some, and as excusable by others? Not merely a single violation, a single act of disobedience to the Constitution, under circumstances of imperative and controlling necessity, but a deliberate abolition of all constitution and law, by formal proclamation, with a substitution in their stead of the arbitrary will of a self-appointed dictator—a dictatorship established over some forty thousand people—a dictatorship enforced by an actual putting down of the legislative and judicial authorities at the point of the bayonet—a dictatorship accompanied with many of the types of all tyranny, and, among others, that ancient one, a prescribed *curfew* hour—a dictatorship enforced for three long, weary months, and for most of that time in pretended apprehension of a defeated, disheartened, and disabled enemy—a dictatorship that was closed in an attempt to inflict an ignominious death upon a worthy and respectable citizen, chargeable with no fault or crime, none, literally none other than having the manhood publicly to call in question the legality of the dictatorship; and this, too, when the dictator had information, which he believed, that the treaty of peace had been actually ratified. What would the men of the Revolution have said to the vindication of such a dictatorship as this, as rightful in itself, and as one to which every good citizen was bound to submit and aid in enforcing? The most temperate among them would have said that he should prefer to be the tenant of the forgotten grave of the humblest man who by hand or voice ever aided the holy cause of freedom, rather than live to enjoy the proudest seat of the most talented Senator, and advocate such slavish principles. But those men of the Revolution, they are gone, all gone, leaving nothing of their spirit behind—none worthy to be called their posterity.

If the moral sense of General Jackson, upon the pretext of mere military discipline, pointed out death as the just and appropriate punishment of Mr. Louallier, for merely calling in question the legality of his assumed authority, did it never strike his defenders, as a strange

casus-omissus in our code, that it should be no crime, with no similarly appropriate penalty, to dispute the rightful commands of ten millions of freemen and subvert their Constitution with an armed force? Have he and they lived thus long under the delusion, that in the enforcement of his martial law he was committing no crime known to and punishable by the laws of his country? Do they think that the framers of our Constitution, who appear to have held this mode of usurpation by martial law in such special abhorrence, have been so negligent as to make no provision for its punishment? That would be a sad delusion indeed, and a most severe imputation against the founders of our Government.

There has been no such negligence—there is no such *casus-omissus*. The case is amply, is well provided for. *It is treason.* It comes completely and entirely within both the spirit and letter of the definition of treason, as given in the Constitution. If a military commander shall suppress the civil authority and enforce martial law by the power of the bayonet, he will owe it to the clemency of his country and not to the want of law, if he does not meet a traitor's doom and felon's death. It is both literally and in effect levying war against the United States. He who levies war against the legally constituted authorities of this country is none the less a traitor because he may happen to have military commission from the Government, or because he is backed by an army of devoted American soldiers. Those facts do but serve to deepen the tincture of the guilt, because, like Macbeth, he is in "double trust." Let it not be said there is the absence of the criminal motive necessary to constitute treason. The motive being what it may, the act of putting down the lawful and rearing up an unlawful government is treason all the world over. The good of the country is the alleged, and frequently the true, motive for all such acts. No man can be allowed the discretion to pursue what he may suppose the public good, by a resort to such means. The use of those means, whatever the motive, must always be adjudged to constitute the crime. Try it as you will, sift the subject as you may, you can make nothing less of it. 'Tis plain unmixed treason.

Yet General Jackson has the modesty to appear before the Government, not humbly seeking its mercy or forgiveness, but proudly demanding what he terms justice, that is commendation and full approval of all he did. He says he does not want the money, and will not receive it back, but upon the condition of exculpation to him and inculpation of the judge who inflicted the fine. The money should not be refunded upon any terms, but certainly never upon those he demands. That fine, in connection with his own most noble conduct pending its infliction, constitutes the only atonement for martial law. There may be room for honest difference of opinion, whether, in consideration of his great military services, the Government was right in receiving that atonement as adequate. But there is no room for difference of opinion as to the propriety of Congress, directly or indirectly, giving its sanction to the enforcement of martial law, loaded down, as that mode of treason is, with all the odium the founders of the Government could

heap upon it, and intrinsically dangerous as it is to liberty. The Government may rightfully remunerate an officer for a violation of law in the destruction of private property under circumstances of great State necessity, such as the instances furnished by Washington at the siege of York, but never when the violation is accompanied with the highest crime known to the law. The only crime which, under the pretext of State necessity, should ever receive even the moral sanction of a republic, is that of assassination, when it is also tyrannicide. The ancient Republics commemorated the virtue and patriotism of the tyrannicide by statues erected in the temples of their gods. But with us, even that most plausible and allowable of all the pleas of necessity should not be countenanced by the law, or receive the direct sanction of the Government. Its absolution must be found in the affectionate gratitude of the nation, and its commemoration left to the immortalizing powers of the orator and the poet. The modern abuses of what may be termed the sacred prerogative of tyrannicide furnish ample warning as to the impolicy of encouraging the exercise of mere individual discretion, in the perpetration of crime and violation of law. The extravagant lengths to which such a man as Mr. Adams is already by analogy endeavoring to push a single unsanctioned precedent of martial law, should afford abundant warning against that particular crime ever receiving the direct sanction of the Government.

General Jackson tells us that his fine ought to be refunded, because, if that precedent is not overruled, military commanders will be deterred from declaring martial law, for fear of the punishment they may receive at the hands of a "vindictive judge." Does he not know that the pardoning power of the President and the supervisory authority of superior courts takes from a judge this power to be vindictive? Does not his historical reading teach him, that the liberties of no country ever fell beneath the ermine of a vindictive judge; but those of every people have been crushed beneath the batons of usurping military commanders? In a community of laws, we want no precedents to encourage the natural proneness of any class of men, and especially military men, to usurp more power than properly belongs to them. They need no spur to prick them on, save only the natural thirst for power, and their own "vaulting ambitions." What we want are precedents of their adequate punishment for delinquencies in this line. When a military man shall debate the question of martial law in his own mind, it shall not be in the fear of what he may suffer "at the hands of a vindictive judge;" but of what he may suffer under the righteous verdict of a jury of his country at the hands of the hangman. We want it to be known and distinctly understood by our military men, that when they undertake to enforce martial law, they undertake to commit high treason, and that they do it with the halter round their necks.

One word as to the report of the minority of the committee of the House of Representatives, though, as to matter or manner, it is not worthy that word. It places the claim to restitution on the importance

of the General's services; and to enhance the value of the victory at New Orleans, it insists that, if the city had been taken by the enemy, England, acting upon her usual policy of might, and not right, would have refused to surrender it, notwithstanding the treaty of peace, and intimates the dastardly opinion, that this nation would have been base enough to permit England to retain it. Has this nation ever shown itself unmindful or ungrateful for the military services of General Jackson? Were such services ever repaid with more heaping measure? Did any man ever owe more to his countrymen? But say that those services still remained to be requited, would that be sufficient reason for such an innovation on the principles of the Government, as directly to sanction the right of a military man to enforce martial law in this country. "Wo worth the day," when the bold hunters of Kentucky and Tennessee gained for their commander that most brilliant chaplet of renown, ever won by the undisciplined valor of a free yeomanry! "Wo worth the day," that could be the occasion of engrafting such a principle upon our institutions! Better that those gallant hunters should have sustained a disastrous defeat; better, far better, that the city should have been sacked and burnt.

Once concede a discretion in any man, or body of men, to set aside the Constitution, though the forms of a republic may still for awhile remain, yet the all-essential, the life-giving principle of civil liberty is gone forever.

NO. III.

It has already been remarked that the suspension of the writ of *habeas corpus* by no means superinduces the establishment of martial law. The effect of a bare suspension of the privilege of that writ would not be to confer upon the Executive even the power of mere arrest; but when accompanied by the other appropriate legislation, it enables the Executive to take and keep in custody such as are suspected of inimical designs against the Government, but who have been guilty of no overt act rendering them directly liable to criminal prosecution. The measure is merely precautionary, and the means allowed are for prevention only, and not for punition. It enables the Executive, under the authorization of the Legislature, temporarily to restrain the freedom of a suspected citizen, so as to prevent him from aiding the rebellion or invasion, and to have him ready, at a proper occasion, to be surrendered to and be dealt with by the judicial authorities, by due course of law, for any offence with which he may be chargeable. The Constitution is express, and without qualification or other exception than that of "cases arising in the land or naval forces, or in the

militia when in actual service in time of war or public danger"—that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property, without due process of law." Indeed, the power of a commander to enforce the ordinary martial law over those actually engaged in military duty in the army or navy does not result from his commission, but comes, in England, from the annual mutiny bill, and in this country from the rules and articles of war ordained by Congress, or similar enactments of the State Legislatures.

Conceding the power to arrest and detain to be a mere ministerial function, Congress may confer that power on the Executive. But the power to try and punish a private citizen could not be conferred on the President or any member of the Executive department; for that is a judicial function which, by the Constitution, can be conferred on the judiciary alone.

The want of power in the Legislature of any one of the States having a formal, written constitution to establish martial law is equally obvious. The constitutions of Massachusetts and New Hampshire alone seem to contemplate a discretion in the Legislature to enforce military service other than that of bearing arms, by pecuniary mulcts or such like penalties, through the instrumentality of a military court. An act declaring martial law, without defining what offences were to be embraced or what penalties attached, would be of no more validity than an act proclaiming the laws of nature. Both would, if for no other cause, be void for uncertainty. But such an act would be also void for direct repugnance to the constitution of every State in the Union. As the charter of Rhode Island, heretofore used in lieu of a constitution, has no bill of rights, it may be inferred by some that its Legislature has an arbitrary discretion on this subject, and that its powers extend even to the appointment of a dictator, which, in substance, seems to have been the object of the late act, judging from the account given of it in the public papers. This, however, would be a great error. The powers of government granted by that charter are expressly declared to be in subordination to the laws of England, and, of course, to what is there deemed the fundamental or constitutional law of *magna charta* and the declaration of rights, though the latter was adopted after the granting of the charter. The long unquestioned usage since the Declaration of Independence may imply an assent on the part of the people of Rhode Island to a legislative power within those limits which do not permit the creation of martial law. The omnipotent power of Parliament to annul or disregard any portion of the English bill of rights did not, at the Revolution, revert to the Legislature, but to the people of Rhode Island; for, as the implied assent of the people to government is contrary to the first principles of liberty, as understood in this country, the powers of the Legislature, none other having been expressly granted by the people, must remain restricted, as they were anterior to the Revolution, except so far as the change of circumstances necessarily and unavoidably required an implied assent to the extension of those powers or the removal

of the restrictions upon them. This, it is presumable, is the mode in which the matter has been heretofore viewed and adjudged in that State. It is not fair to presume the people of that State would have so long endured an unrestrained power in the Legislature. A power must therefore be found in the charter itself for the Legislature to alienate all the powers of government to a single man, or, in other words, to create a dictatorship under the name of martial law, or none such can exist.

If this view of the subject should by any one be deemed not correct or conclusive, there is another that is undoubtedly so. The Federal Constitution says the United States shall guaranty to each State a republican form of government. When the people of Rhode Island acceded to that constitution, they made express declaration that their State government then was, or gave express assent that it should forever thereafter be, a republic within the meaning and contemplation of the Constitution. It is unnecessary to attempt the delicate and perhaps difficult task of defining what is a republican form of government within the meaning of the Constitution; for there is no difficulty in the conclusion that the consolidation of all the powers of government into the hands of one man, however appointed, is not a republican form of government within that meaning. Nor could the people of any State, by any mode, adopt or create a government which vested absolute arbitrary power in a single man. Much less, therefore, can it be contended that the Legislature has the power to create such a form of government without the express sanction of the people.

Or, in other words, if it can be shown, by any process of reasoning, that the Legislature of Rhode Island does possess the discretion and power, to create a military dictatorship over that State, then the *casus foederis* has arisen, which requires the interposition of the United States, under the constitutional guarantee of a republican form of government, to the people of every State. Whatever difference of opinion may have existed as to the propriety of the Government interposing, pending the recent rebellion, there would or should be no such difference of opinion as to the propriety of interposition, for the purpose of relieving the people of that State from a dictatorship. The enforcing, or the attempt to enforce, such a form of government upon the people of that State, by an armed force, would most undoubtedly be treason in the actors, and all aiders and abettors of such a project.

APPENDIX.

(Written June, 1861.)

Silent leges inter arma, is not—never was a legal maxim. Such a maxim would be incongruous in any civil code. It is not—never was—never can be a recognized principle in the code of any government pretending to have civil liberty for its basis. Under every such government, the law necessarily claims for itself absolute supremacy at all times and under all circumstances. Otherwise it could not be a government of law. Whenever public safety may require the temporary deprivation of freemen's right to exemption from arbitrary arrest, it confides the discretion to judge the necessity and the power to make the suspension alone to its highest department—its legislative department. The act of suspension, and the power exercised during the suspension, are all parts of the law itself.

Our written constitutions have even taken the superabundant caution to proclaim that they are "the supreme law of the land." All officials are sworn to maintain them in that supremacy. They recognize no equal—still less a superseding superior. They spurn all pretended laws of necessity as their equals or superseders. They expressly condemn and denounce all laws of war or arms, except such as are created by the Legislature, under constitutional restraint. *Without this perpetual supremacy of law and constitution, there can be no civil liberty.*

It is, perhaps, not possible to trace the origin of the phrase, *silent leges inter arma*. The eloquent Mr. Storrs, of New York, said, in Congress, some forty years ago, that it "first fell from the dastard lips of the coward Cicero whilst playing sycophant to the dictator Cæsar." Enlightened jurists and statesmen have always classed it with the Jesuit maxim—"the end justifies the means;" the one being not less repugnant to freedom than the other to sound morals. They have classed it with *salus populi suprema lex*, that immemorial pretext for military usurpation and tyranny. They have also classed it with the slavish precept of "passive obedience and non-resistance to the divine right of kings,"—the phrase inculcating, as it does, passive obedience and non-resistance to the devil-derived right of usurpation. The founders of our Government taught that public safety can always be preserved, though government officials be restrained within the limits of the Constitution; or if not so to be preserved, it will be because of the corrup-

tion of the people, who will have ceased to be worthy of the name of freemen. It will be full soon enough to disregard this teaching when its perfect wisdom shall be disproved by repeated experiments. Thus far, our national experience, as also that of England, has been all in its favor. They taught that the utmost possible temporary mischief which might ensue from the want of power to proclaim martial law, could not equal the permanent mischief that would ensue from recognizing a discretion in military commanders or Presidents, to usurp power in disregard of the Constitution, under any pretext whatever.

It would be incredible, if we had not the proof before our eyes in the public press, of the amount of gross ignorance prevalent in the nation upon this important subject, causing the utterance of the wildest vagaries as to the powers of the President and his military subordinates, calculated to lead even well-intentioned, loyal officers into serious difficulties, perhaps into great criminal offences. Unable to meet the recent very lucid and convincing argument of Judge Taney, a respectable editor attempts to get rid of it by saying it has no application to the present state of things, because it is based upon the Constitution, which he insists is a mere fair-weather constitution, not intended to operate in the stormy times of war or rebellion. This, too, in the face of the very words of the Constitution, which expressly provides the necessary power for carrying on war and suppressing rebellion. The very reverse of this idea is the truth. With much more propriety could it be said that constitutional constraints upon power and the bill of rights were not made for the calm sunshine of peace and public quiet, when there is little temptation to encroach upon private right or freedom, but for those tempestuous periods of war and rebellion, when the vindictive passions of men lead them to persecution.

We are told that a respectable law lecturer at the North instructs his class, that martial law is an indispensably necessary power to every government, as much so as the power of carrying on war in self-defence. There never was an assumption less sustained by fact or reason. As the long war for our independence was successfully carried through in the midst of numerous traitors and tories without a resort to martial law, and as Jackson was the only commander who fancied a necessity for it during the three years' war of 1812, nothing can be more absurd than the assumption of any such necessity. Another all-sufficient disproof of the fact is, that during the various conspiracies and rebellions in England during the last century and a half, though the *habeas corpus* was frequently suspended, yet martial law has never been resorted to as a means or an aid towards their suppression. Indeed, as decided by Lord Loughborough, it has been uniformly held to be totally incompatible with the genius of the English Constitution. If, with such a crowded population as they have in England, often starving and rebellious, there is no necessity for martial law, how perfectly preposterous to contend for it as a thing of absolute necessity in this country!

The lecturer says martial law is "wholly arbitrary," and adopts the definition of it given by the Duke of Wellington, "the will of the com-

mander-in-chief." Yet it is contended that such an infamously slavish principle as this, suited only to a nation of slaves, is lurking unexpressed in our free institutions as an indispensable incidental power of all governments. Can it be that the superintending authorities knowingly permit the inculcation of such abominable doctrine in our principal law school, and that the lecturer himself does not perceive that he is training its pupils to become the willing slaves of a military usurper?

The suspension of the writ of *habeas corpus* in England gives the power of temporary arbitrary arrest, because the crown has at all times the power of arrest. Not so as to the President or a Governor in this country, who have, *ex-officio*, no such power, and Judge Taney even doubts whether such power could be conferred upon them by the Legislature. Without expressing any opinion upon this doubt, it is perfectly clear to my mind, as it must be to every lawyer, that as he decides no power can be conferred by a congress or a legislature upon the President or a Governor, or a court martial to try and punish even a prescribed defined offence on the part of a free citizen not engaged in military service. The Constitution is perfectly impregnable upon this subject, and being so, can there be grosser folly than to suppose that a President may rightfully usurp power to arrest, try, and punish by his arbitrary will?

It is high time our officers should be informed, that so far from a President having power to make or authorize the arbitrary arrest of a free citizen, if he were to attempt to make or aid in making such an arrest, the citizen would have a right to kill the President in self-defence, and would be acquitted as for justifiable homicide by any intelligent court and jury. Whereas, if the citizen were killed in making resistance, the President and his aiders would, in the eye of the law, be guilty of wilful murder, and condemned to the gallows, if the law was faithfully administered.

The profession and the country owe Chief Justice Taney so much for his recent orthodox, lucid, and most convincing opinion in the *habeas corpus* case, that it is painful to hold him up for censure as a promoter of the loose opinions now afloat in this country. He delivered the opinion of the Supreme Court, in Luther *vs.* Bordlen, 7 Howard, which sanctioned the power of the Legislature to establish martial law over Rhode Island. It is true, the Court distinguish the case from that of an act of Congress or the statutes of any other State, by reason of the fact that the people of Rhode Island were living without the protection of a written constitution or bill of rights. Still the Court seems to recognize martial law as a sort of necessary governmental instrumentality, to which an untrammeled legislature might resort even in this Union, though the Constitution guarantees to each State a republican form of government. It is not the purpose to go into a *seriatim* argument to prove how repugnant is the possession and exercise of such power to all our American ideas of a republican government. The foregoing pamphlet was written shortly after the passage of the act in question. The author's opinion as to its validity, and the reasons for

that opinion, will there be found. Such as they are, he can well afford to submit them to the profession for a candid comparison with those of the Court. He will here merely subjoin a few remarks to fortify one of the main points relied on by him, and upon a decision of which the Court might have escaped its pernicious blunder as to martial law, if, unfortunately, the point had not escaped the attention of the whole Court, the dissenting Judge included.

The statute is a very brief one, in these words: "The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force, until otherwise ordered by the General Assembly, or suspended by proclamation of his excellency, the Governor of the State." June 25, 1842. The statute does not say what shall be an offence under it, who shall arrest the offender, who shall try or who shall punish him, nor what shall be his punishment. The point overlooked by the Court is, that the statute was *void for uncertainty*.

The only clue given to the legislative intent is to be found in the true signification of the phrase *martial law*, whatever that may be. The law authorities all tell us that it is not merely undefined, but it is undefinable. No man knows what it means. The Legislature had as well have expressed itself in an unknown language, or some unintelligible jargon. Even the adventurous lecturer who so gallantly advocates it, substantially admits that, after all his research, he has been unable to find out what it is. The nearest approximation to a definition that he has been able to find, or invent, is this: "*The will of the Commander-in-chief.*" But far be it from me to make the degrading imputation against the Court, that such was its sense of the meaning. No man filling such an exalted station could be so reckless of civil liberty as to concede a power to place the lives, the fortunes, and the liberty of the people of an entire State of this Union, at the capricious will of a military chief. The venerable judges must have trusted to the fact of the statute having been adjudged valid by the State Courts, that the phrase must have a known, settled signification in Rhode Island, though they themselves could not find it out, and acquiesced from that comity and deference which they habitually extend to State construction of State statutes. Could they have forgotten the indignant rebuke given by Burke on the trial of Warren Hastings, to the suggestion of *arbitrary power*, even in a Governor-General of India?—

"*He* have arbitrary power!! My lords, the India Company have not arbitrary power to give him; the king has no arbitrary power to give him; your lordships have not; nor the Commons; nor the whole Legislature. We have no arbitrary power to give, because arbitrary power is a thing which no man can hold, nor any man can give. If, then, all dominion of man over man is the result of Divine disposition, it is bound by the eternal laws of Him who gave it, with which no human authority can dispense; neither he who exercises it, nor even those who are subject to it; and if they were mad enough to make an express compact that should release their magistrate from his duty, and should

declare their lives, their liberties, and their property dependent upon, not rules and laws, but his mere capricious will, that covenant would be void." According to Burke, all the people of the State in Convention could not have granted an arbitrary power, such as the Court concedes a right in the Legislature to create, without any specific authority, express or implied, from the people. It is rather a melancholy and mortifying reflection, that an English statesman should, even at that early day, have had a so much higher appreciation of human freedom, than do now some of our most enlightened American jurists.

It is a familiar legal principle, "that if a statute is so ambiguous, or confused, that the courts cannot with certainty discover its meaning," they will pronounce it void, because of the uncertainty. With all deference, such should have been the decision of the Court upon this statute. The Legislature must speak in intelligible language, or it ought not to expect obedience to its command.

We were fully forewarned by our older statesmen, that disunion or secession would necessarily be attended by a prolonged civil war. Their sagacity having been so far verified, we should carefully heed the balance of their warning. They warned us that the result of such a war would be the establishment of one or more military despotisms over the nation. Everything now going on is facilitating and hastening that result. Habitual disregard of law and constitution brings them into contempt, destroys all reverence and affection for the Government, and thoroughly demoralizes the whole moral tone of the national mind. The outrages of one party become the ample justification of the other. Every citizen knows he has as much right to violate the Constitution as a President, and thousands of citizens acting together as a civil or military mob, will think they have a far better right to trample on the Constitution. When a President wilfully disobeys the sanctified writ of *habeas corpus* issued by the Chief Justice, he, by his example, encourages all manner of disregard to law and constitution. He inaugurates anarchy. He uses the influence of his high position to inaugurate throughout the nation, mob-law, lynch-law, and vigilance-committee-law. These have proved everywhere the precursors of military despotism.

No one would seriously impute to the present jocose, amiable incumbent of the Presidential chair the deliberate purpose of establishing a military despotism on the ruins of our free institutions, either for his own benefit or that of his party. But if such be, as they clearly are, the probable effects of his acts, he should be checked and controlled without regard to his motives or intentions. He should be impeached for his disobedience to the writ of *habeas corpus*. He should be impeached for wilful disobedience to the command of this great nation of freemen, legally issued through its authorized functionary, the Chief Justice. His impeachment and amotion from office would be worth more to the sacred cause of liberty, would be worth more to the permanency of free institutions in this nation, than even the speedy suppression of the present great rebellion.

The reiterated outrages of the seceded traitor States upon all obligations of patriotism, duty, and honesty, together with their encouragement of the most infamous treachery in traitor officials, affords already, with the inconsiderate million, ample justification for Presidential usurpation of any degree of power he may choose to think necessary towards suppressing the rebellion. The unparaleled infamy of the members of the Virginia Convention and the Tennessee Legislature, in their base betrayal of popular trust, aggravated this sentiment. The considerate few, they especially who as members of Congress the people have appointed the sworn guardians of the Constitution, should think and act quite differently. They should teach the nation that the preservation of the Union is principally desirable for the sake of the Constitution, which is itself to be valued and cherished principally because it is the consecrated guardian of the inestimable principles of civil liberty. They should teach that treason to those principles is more than treason to country; that the destruction of the Constitution is too costly a price to pay even for the preservation of the Union; that when the nation becomes so demoralized as not to properly appreciate the sanctity of the Constitution, the Union will no longer be worth preserving, for the nation will already be prepared for the rule of a master. But nothing of the sort will be done. The halls of Congress, filled as they are with intense partisans, are the last place where we should look for independent patriotism, especially at a time when all society seems guided by the principle, that "thrift follows fawning." Still we should not be without hope, that some dozen or twenty manly, independent members of the House of Representatives may be found who will, by a vote of impeachment, make a solemn protest against Presidential usurpation, so that it shall not wear the aspect, and be quoted hereafter, as an unchallenged precedent.

Public sentiment, however unwisely, will, no doubt, sanction the ratification by Congress of most of the many recent Presidential usurpations under the plea of necessity; but the arbitrary arrest and deportation of private citizens, with a contemptuous disobedience to the writ of *habeas corpus*, should not be of the number. It has been well said of the President's conduct in this particular, that it was *folly*, which Talleyrand would have pronounced "worse than a *crime*." The wanton murder of the Duke D'Enghien only served to fix an indelible stain on the character of the tyrant Bonaparte; and this conduct, without the apology, as it is, of even supposable national necessity or national benefit, can only serve to bring odium and disgrace on the Government.

If properly considered, there has been, most probably, no actual necessity for any part of the usurpations of President Lincoln. Congress could have been assembled more than a month ago—by the first of June at least—and all the requisite power for suppressing the rebellion have been legally obtained. In the meantime the *law* furnished him ample power and means to protect the Capitol and the few remaining forts. That, no doubt, was his principal, if not sole object, at the time he issued his first proclamation; and if he had with manly frank-

ness so stated, we should not have lost a single Union vote. Volunteers from Maryland, Kentucky, Tennessee, and Missouri would have rapidly flocked to him in such numbers as to protect the Capitol without aid from the free States. The enthusiasm and unanimity with which the proclamation was greeted from the North caused the after-thought of precipitately crushing out the rebellion. Whether that after-thought was a wise one there is great room for difference of opinion. Some of our wisest think, that so far from being the speediest mode of putting down the rebellion and restoring the Union, it will prove about the tardiest that could have been devised. But, wise or unwise, it was a policy of such transcendent importance that Congress ought to have had an opportunity to decide upon it, there being neither want of time nor any actual necessity for precluding its decision by rash anticipatory Executive action. There is nothing apparently left for Congress, and Union-loving men throughout the nation, who will not abandon their government and be thrust into the arms of a causeless, traitor rebellion for the blunder of an Administration, but to acquiesce, trusting to Providential deliverance from blundering on the one hand and treason on the other. Should national ruin be the result, let us all protest in advance against *State necessity* being made the scape-goat for the blunder. It will be soon found in the progress of the long war before us, that the gain of only a few weeks in commencing the attempt at suppression by invading coercion, is so trivial a something as not really to excuse, much less justify, enormous infractions of the Constitution. If there be an exception, it is the blockade of the Southern ports, which was so far a matter of actual, immediate necessity, as to induce every patriot to view the act with the utmost leniency.

Every good citizen should aid in the expurgation of the dogma, *State necessity*, from our system of government as a justification for usurpation or abuse of power. The dogma is, as it always has been, always will be, an aid to military despotism. It can have no safe lodgment—it can never do good in a republic.

Perpetual vigilance being the price of liberty, we should heed the precept at the present above all other times. There never can be an occasion which can more require the marking and protesting against usurpation. To suppose a want of sound, gainful policy in so doing, is to cast a calumnious imputation upon the loyalty and intelligence of the Union men of the nation. It is imputing that, for mere temporary well-intentioned acts of a President, they might be induced to countenance treason, and aid in destroying their country. True Union patriots will adopt the policy with a just, a manly confidence in their fellow-freemen. With all deference it is suggested, that there can be no more damaging policy to the Union cause, than for its leaders voluntarily to incur the imputation of recklessly justifying everything the President has done, or may choose to do. Such servility can never win the confidence of this nation.

It is due to the memory of Senator Berrien to state, that in a speech delivered in 1843, he said that his speech of the previous year, from which the foregoing pamphlet quoted, was grossly misreported.

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